



Final Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) citation	22 VAC 40-740
Regulation title	Adult Protective Services
Action title	Implement 2004 APS Legislation
Date this document prepared	December 6, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

These regulatory changes are being made to conform the regulation to legislation passed by the 2004 General Assembly that amended the *Code of Virginia*, §§ 63.2-1603 through 1610. Regulatory changes include new definitions, and new sections on the expanded list of mandatory reporters, the adult protective services (APS) investigation, application for services, assessment narrative and disposition, and the civil penalty for non-reporting.

Adult protective services in Virginia are provided to any person aged 60 and over and adults aged 18 and over who are incapacitated. The 2004 APS legislation reflected best practices in APS enhanced programs that have worked in Virginia. Early identification of possible abuse, neglect, and exploitation of adults, the opportunity to protect adults and provide needed services, and the prevention of adult abuse, neglect and exploitation are issues that these amendments seek to address.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Board of Social Services took final action on 22 VAC 40-740, Adult Protective Services, on December 6, 2006.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The State authority is found in the Code of Virginia, §§ 63.2-217 and 63.2-1605.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory amendment is to conform the regulation to APS legislation passed in the 2004 Session of the General Assembly. These regulations protect the health, safety and welfare of citizens of Virginia by establishing enhanced protections for Virginia's vulnerable adult population and best practices in APS for the Commonwealth.

Amendments are also based on recommendations from an APS advisory committee that was established to assess Virginia's APS program and a legislative report issued in December 2002 entitled, *Adult Protective Services: Identifying and Preventing Adult Abuse, Neglect, and Exploitation*.

The best national estimate of the incidence and reporting of elder abuse and neglect is that only 16 percent of all incidences are reported to APS (National Elder Abuse Incidence Study (NCAIS), 1998). The aging of Virginia's population, as documented in the Joint Legislative Review Commission's November 2005 report on the impact of an aging population on state services, indicates that the rate of adult abuse, neglect and exploitation is expected to increase. These regulations strengthen the Commonwealth's ability to respond to those demographic and social pressures.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

- 1) Clarifying population served and adding that reports of suspected abuse, neglect, or exploitation may be made to the local department of social services (local department) OR the 24-hour, toll-free APS hotline;
- 2) Requiring local departments to initiate an investigation within 24 hours of the report;
- 3) Requiring the local department to refer matters as appropriate to the appropriate licensing, regulatory, or legal authority for administrative action or criminal investigation;
- 4) Defining “collateral;” “disposition;” “documentation;” “notification;” “preponderance of evidence;” “service plan;” and “valid report;”
- 5) Changing the timeframe for reporting of suspected adult abuse, neglect, or exploitation by mandated reporters to "immediately" except reports by nursing facility inspectors employed by the Department of Health in the course of a survey.
- 6) Adding persons to the list of APS mandated reporters, including persons in professions regulated by the Department of Health Professions, emergency medical services personnel, and guardians;
- 7) Noting that the APS Program respects the rights of adults with capacity to make their own decisions, even if they do not appear to reasonably be in the best interest of the adult;
- 8) Requiring mandated reporters to report immediately to the appropriate medical examiner and law-enforcement agency when there is reason to suspect that an adult died as a result of abuse or neglect;
- 9) Updating the entities that can receive APS information when there is legitimate interest in a case; and
- 10) Authorizing the Commissioner of the Department of Social Services to impose civil money penalties for cases of non-reporting by all mandated reporters except law-enforcement officers (the courts retain jurisdiction for cases involving law enforcement), determining how penalties will be determined, and establishing an appeals process.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) *other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage of this action is to better protect the health, safety and well-being and provide services to some of the Commonwealth’s most vulnerable citizens. This action poses no disadvantages to the public or the Commonwealth. This action encourages expanded cooperation and communication among the regulated community and government agencies in investigating, ameliorating and preventing the abuse, neglect or exploitation of vulnerable adults in the Commonwealth. Employers are asked to ensure that their employees who are mandated reporters are notified of their responsibilities; information has been developed by the Department for this purpose and can be added to existing employee orientations.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
740-10	Definition of “adult protective services” was revised.	Added language addressing restoration of self-sufficiency.	Supports the goals of adult protective services.
740-10	Definition of “exploitation” was revised.	Returned to original definition of exploitation.	Agreed with public comments that revision was not necessary.
740-10	Definition of “incapacitated person” was revised.	Replaced “dementia” with “advanced age” in definition.	To conform to code language.
740-10	Definition of “Mandated reporters” was revised. “Immediately” defined in definition of mandated reporters	Further revision of the definition of “Mandated reporters. Remove the definition of “immediately.”	Agreed with public comment.
740-10	Definition of “mental anguish” exclusion of additional intentions of perpetrators.	Added the terms “change behavior” to the list of intentions of perpetrators.	Agreed with public comment.
740-10	Definition of “valid report” added	Language added for clarification.	Code language must be maintained.
740-15		Added new section on mandated reporters, incorporating language stricken from Definitions section.	Agreed with public comment.
740-80-A 1	The local director will notify the mandated reporter within 15 days of the decision to recommend the imposition of a civil penalty.	Removes notification requirement and adds the requirement for the local director to prepare a written statement of facts concerning the mandated reporter’s failure to report and submit it to the Commissioner	Provide clarification of imposition of civil penalty procedures.
740-80 A2	No appeal or alternatives for findings of APS investigations	A 2 removed from proposed regulation.	Public comment presented a reasonable argument for the removal.
740-80 A2		New language clarifying that the mandated reporter will be notified within 15 days of the decision to recommend a civil penalty. Requirement added that a copy of the local director’s statement of fact will be included in the notification and that the notification will include a statement that the mandated reporter may submit a statement to the Commissioner concerning the mandated reporter’s failure to report.	Provide clarification of imposition of civil penalty procedures.
740-80 A3		Provides time-frame for the submission of the mandated reporter’s statement to the Commissioner.	Provide clarification of imposition of civil penalty procedures.
740-80 B1	The Commissioner will review the local director’s	The Commissioner will review the local director’s statement of fact and the mandated reporter’s statement	Provide clarification of imposition of civil penalty procedures.

	recommendation to determine whether to impose a civil penalty.	to determine whether to impose a civil penalty.	
740-80 B3a	Civil penalty for first offense qualified by lack of harm or injury	Qualification removed	The Code does not qualify the failure to report by injury or harm
740-80 B3b	Civil penalty for first offense qualified by lack of harm or injury	Removed as redundant.	The Code does not qualify the failure to report by injury or harm
740-80 B3c	Civil penalty for second offense qualified by lack of harm or injury	Qualification removed.	The Code does not qualify the failure to report by injury or harm
740-80 B3d	Civil penalty for second offense qualified by lack of harm or injury	Removed as redundant.	The Code does not qualify the failure to report by injury or harm

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
<u>Alzheimer’s Association</u> (Carter Harrison)	22 VAC 40-740-10: In the definition of “exploitation,” remove the phrase “or by exerting undue influence over adults” or further define “undue influence.”	Agreed. The phrase “or by exerting undue influence over adults” will be removed from the final regulation.
	In the definition of “incapacitated person,” the inclusion of “dementia” is supported.	When applicable, definitions in the regulation must be the same as those in the Code. The term “dementia” (regulation) will be changed to “advanced age” (Code).
	In the definition of “neglect” (#4), add clarifying language to further define “inadequate supervision.”	As written, “Inadequate supervision” has been in the regulations since at least 1989. It is defined as “necessary to protect the safety and well-being of the adult”. No modification was made.
<u>Alzheimer’s Association</u> (Carter Harrison)	In the definition of “neglect” (#6), amend the first sentence to read: ‘Medical neglect includes, but is not limited to, the withholding of the adult’s medication or aids such as dentures, eyeglasses, hearing aids, walker, etc.’	A Needs Protective Services disposition is made and services offered if the client doesn’t have the care/aids they need and failure to receive it impairs or threatens to impair their well-being. Protective services are provided in an attempt to make sure the client gets those aids, etc. No modification was made.
	22 VAC 40-740-31: In section B, the term “representative” should be amended to “legal representative.”	It is unclear what is meant by “legal representative” in the public comment. No modification was made to section B of the final regulation.
	In section D2, the term “someone authorized” should be amended to “someone legally authorized.”	If the client <i>authorizes</i> someone to sign an application, it is legal. No modification was made.

<p><u>Radford University College of Arts and Sciences: Department of Criminal Justice</u> (Lucy Hochstein)</p>	<p>22 VAC 40-740-10: Rephrase the definition of “exploitation” to clarify that all elder adults, incapacitated or not, are included in the protected group.</p>	<p>The definition of “incapacitated person” covers the elder in the definition of exploitation. Besides stating some qualifying factors, it also states “other causes” and is based on the ability of the adult to make, communicate or carry out reasonable decisions. No modification was made.</p>
	<p>In the definition of “lacks capacity to consent,” add a phrase that states that exploitation can result in serious harm to elder adults, and is subject to consideration under this definition.</p>	<p>It is universally accepted that any form of exploitation is harmful. No modification was made.</p>
	<p>In the definition of “mandated reporters,” the language should be amended to include bankers, real estate agents and real estate attorneys, as mandated reporters</p>	<p>The Code names such institutions as voluntary and encouraged to report. No modification was made.</p>
	<p>In the definition of “mental anguish,” add pressure to change behavior” to the list of intended consequences or perpetrator’s actions.</p>	<p>Agreed. The language, “to change behavior,” will be added.</p>
	<p>22 VAC 40-740-50: Under E, delineate what “appropriate” means here.</p>	<p>Webster’s Third New International Dictionary (unabridged) defines “appropriate” as “specially suitable.” No additional clarification was made.</p>
	<p>Under F2, add a section that promotes referral of cases to law enforcement, and specifies when law enforcement should be notified.</p>	<p>The Code specifies when law enforcement must be notified. No modification was made.</p>
	<p>22 VAC 40-740-80: Include a statement that specifies what types of reporting omissions should regularly receive penalties.</p>	<p>Specifying types would remove the discretion of the local directors and the commissioner on when to impose civil penalties and doesn’t take into account all the factors of any particular case. No modification was made.</p>
<p><u>VA Association for Home Care</u> (Marcia Tetterton)</p>	<p>22 VAC 40-740-10: Maintain the current definition of “exploitation.”</p>	<p>Agreed. The phrase “or by exerting undue influence over adults” will be removed from the final regulation.</p>
	<p>In the definition of “mandated reporters,” the language should be amended to meet the legislative intent and thus should read, “Such reports shall be made forthwith by the following persons acting in their professional capacity as set forth in §63.2-1606:”</p>	<p>Language included in legislation passed in Virginia is believed to reflect the intent of that legislation. No modification was made.</p>
<p><u>VA Association for Home Care</u> (Marcia Tetterton)</p>	<p>In the definition of “neglect” (#4), further define “inadequate supervision.”</p>	<p>As written, “Inadequate supervision” has been in the regulations since at least 1989. It is defined as “necessary to protect the safety and well-being of the adult”. No modification was made.</p>

	In the definition of “neglect” (#6), amend the language to include the following: ‘withholding of medication or aids ...’ and before ‘unauthorized administration of ...’	A Needs Protective Services disposition is made and services offered if the client doesn’t have the care/aids they need and failure to receive it impairs or threatens to impair their well-being. Protective services are provided in an attempt to make sure the client gets those aids, etc. No modification was made.
	22 VAC 40-740-50: Under C. 14, review existing law with regard to the disclosure of adult protective services information to prosecutors to insure that there is no conflict statute or regulation.	There is no conflicting statute or regulation. No modification was made.
	22 VAC 40-740-80: Under B1, add the following sentence at the end of Item B1: “Such determination is subject to procedures set forth in Article 3 of Chapter 4 of Title 2.2 (§2.2-4018 et seq.)”	B1 removed from final regulations. Additional procedures for the imposition of civil penalties added.
<u>VA Department of Health</u> (Nancy Hofheimer)	22 VAC 40-740-10: In the definition of “mandated reporters,” the language should be amended to meet the legislative intent and thus item #8 should be stricken from the proposed regulation.	Language included in legislation passed in Virginia is believed to reflect the intent of that legislation. Number 8 also helps to meet one of the recommendations in the Olmstead Act (Executive Order 84): “Assuring an appropriate statewide system for reporting of allegations of abuse, neglect, serious injuries and deaths by providers of community services and supports to people with disabilities.” No modification was made.
	The definition of “immediately” should be stricken from the proposed regulation.	Agreed. The definition will be removed.
	22 VAC 40-740-80: Strike 22 VAC 40-740-80 A2 from the proposed regulation.	Agreed. B1 removed from final regulations. Additional procedures for the imposition of civil penalties added.
<u>VA Health Care Association</u> (Beverley Soble)	22 VAC 40-740-10: In the definition of “exploitation,” remove the phrase “or by exerting undue influence over adults” or further define “undue influence.” Maintain the current definition.	Agreed. The phrase “or by exerting undue influence over adults” will be removed from the final regulation.
	In the definition of “mandated reporters,” the language should be amended to meet the legislative intent and thus should either read, “Such reports shall be made forthwith by the following persons acting in their professional capacity as set forth in §63.2-1606.” Or, Code language should be included.	Language included in legislation passed in Virginia is believed to reflect the intent of that legislation. No modification was made.
<u>VA Health Care Association</u> (Beverley Soble)	In the definition of “neglect” (#4), further define “inadequate supervision.”	As written, “Inadequate supervision” has been in the regulations since at least 1989. It is defined as “necessary to protect the safety and well-being of the adult”. No modification was made.

	In the definition of neglect” (#6), amend the language to include the following: ‘knowing and willful’ before ‘withholding of medication or aids...’ and before ‘unauthorized administration of ...’	A Needs Protective Services disposition is offered if the client doesn’t have the care/ aids they need and failure to receive it impairs or threatens to impair their well-being. APS is to attempt to make sure the client gets those aids. No modification was made.
	22 VAC 40-740-50: Under C14, review existing law with regard to the disclosure of adult protective services information to prosecutors to insure that there is no conflict statute or regulation.	There is no conflicting statute or regulation. No modification was made.
<u>VA Hospital and Healthcare Association</u> (Susan Ward)	22 VAC 40-740-10: Maintain the current definition of “exploitation.”	Agreed. Removed the phrase “or by exerting undue influence over adults.”
	In the definition of “legitimate interest,” clarify “a lawful, demonstrated privilege to access the information.” The section seems to less inclusive than the original application of the term “legitimate interest.”	The procedures disclosure of APS information based on “legitimate interest” is found in 22 VAC 40-740-50.
	Replace the term “privilege” with “reason,” “purpose” or “authority.”	Webster’s Third New International Dictionary (unabridged) defines “privilege” as “a right or immunity granted as a peculiar benefit, advantage or favor.” No additional clarification was made.
	The last sentence should read, “Such reports shall be made forthwith by the following persons acting in their professional capacity as set forth in §63.2-1606:”	Language included in legislation passed in Virginia is believed to reflect the intent of that legislation. No modification was made.
	In the definition of “mandated reporters,” the substance in this definition should be included in the body of the regulation instead of in the definition.	Agreed. Section 740-15 added.
	In the definition of “neglect” (#4), further define “inadequate supervision.”	As written, “Inadequate supervision” has been in the regulations since at least 1989. It is defined as “necessary to protect the safety and well-being of the adult.” No modification was made.
	In the definition of “neglect” (#6), amend the language to include the following: ‘knowing and willful’ before ‘withholding of medication or aids...’and before ‘unauthorized administration of...’	A Needs Protective Services disposition is offered if the client doesn’t have the care/ aids they need and failure to receive it impairs or threatens to impair their well-being. APS is to attempt to make sure the client gets those aids. No modification was made.
	<u>VA Hospital and Healthcare Association</u> (Susan Ward)	22 VAC 40-740-50: Under C14, review existing law with regard to the disclosure of adult protective services information to prosecutors to insure that there is no conflict statute or regulation.

	Under F1, there is a typographical error. The reference should read, “. . . area agencies on aging . . .”	Agreed.
	Under G2, clarification should be provided as to whom the local departments are authorized to disclose information under this provision.	See §63.2-104. Confidential records and information concerning social services; penalty. No modification was made.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
40-740-10		Definition of “Adult protective services”	Revised to reflect code and program goals. Added definition of “collateral” to reflect Code. Added definition of “disposition” to reflect Code. Added definition of “documentation” to reflect Code.
		Definition of “Legitimate interest”	Revised to include Code reference.
		Definition of “mandated reporters”	Part of definition moved to a new section of regulation (22 VAC 40-740-15)
		Definition of “Neglect”	Revised and expanded to reflect Code and add “medical neglect” definition.
			Added definition of “notification” to reflect Code.
			Added definition of “Preponderance of evidence” for measurement of whether abuse, neglect or exploitation occurred.
		Definition of “report”	Revised to allow APS reports to be made to the local departments of social services or the APS hotline. Added definition of “Service Plan” to reflect Code. Added definition of “valid report” to reflect Code.
40-740-10	22VAC 40-740-15	Definition of “mandated reporter” containing list of reporters no longer applicable due to Code change	Creates a new section to conform to Code expanding list of mandated reporters.

40-740-20		Provides application process and guidelines for determining the appropriate agency responsible for an investigation.	Deletes section and moves information to new sections 21 and 31.
	22VAC 40-740-21	No current requirement.	Creates new Adult Protective Services investigation regulation to conform to Code on the initiation of APS investigation and includes pertinent provisions of §63.2-1607 that was repealed.
40-740-30		Provides time frames for initiating an APS investigation no longer applicable due to Code change.	Deletes current APS investigation regulations replaced by 22 VAC 40-740-21
	22 VAC40-740-31	No current requirement.	Adds new “Application for the provision of services” regulation to comport with §63.2-1603 et seq.
40-740-40		Provides standards for making a disposition after the completion of an APS investigation.	Changes regulation title from “Dispositions” to “Assessment narrative and disposition,” expanding and clarifying narrative assessment requirements and standards for making a disposition after the completion of an APS investigation, pursuant in part to §63.2-1610.
40-740-50		Describes the protection of confidential information; list of agencies and persons permitted to receive confidential information and the type of information that can be released.	Expands and clarifies the agencies and persons having a legitimate interest in confidential information obtained during an APS investigation. Protects the identity of the reporter unless disclosure is authorized by the reporter or ordered by the court. Details the type of information that can be disclosed. Allows the commissioner and the local director to disclose information to other agencies or persons not listed when they have a legitimate interest in the information.
40-740-60		Describes the process for providing protective services to a client as the result of an APS investigation.	Changes title from “Services provided” to “Opening a case for service provision.” Describes the process for providing services to a client as the result of an APS investigation.
	22 VAC 40-740-70 22 VAC 40-740-80	No current requirement.	Creates new section, “Civil penalty for non-reporting,” and establishes procedure for the imposition of civil penalties when mandated reporters fail to report abuse, neglect or exploitation.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while

minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This regulatory action has no known impact on small businesses. The discovery, investigation, alleviation and prevention of the abuse, neglect and exploitation of vulnerable adults is in the best interest of the small business community and of all Virginians.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These regulations strengthen the role and rights of families in the protection and care of vulnerable adults, whether they are elders or adults with a disability. They encourage responsibility of and for adult family members; protect marital commitment; and protect against financial exploitation.

Local departments of social services receive and investigate more than 12,000 reports of adult abuse, neglect, and exploitation annually, about 7,400 or 61 percent of which are found to be substantiated. Adult protective services is the only program authorized by the *Code of Virginia* (§ 63.2-1607) to investigate suspected abuse, neglect, and exploitation across all care settings. Reports alleging that adults are abused, neglected, or exploited, or are at risk of abuse, neglect, or exploitation and are unable to protect their own interests due to vulnerability associated with incapacity or due to a mental or physical disability are investigated. Services are provided to those adults who are found, through an APS investigation, to require protective services.